UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL KLEEBERG, LISA STEIN, AND
AUDREY HAYS,

Plaintiffs,

-vs-

LESTER EBER, ALEXBAY, LLC, F/K/A LESTER EBER, LLC,
ESTATE OF ELLIOT W. GUMAER, JR., AND WENDY EBER,

Defendants,

and

EBER BROTHERS & CO., INC., EBER BROS. WINE & LIQUOR CORP., WINE & LIQUOR METRO, INC., EBER-CONNECTICUT, LLC, EBER-RHODE ISLAND, LLC, EBER BROS. ACQUISITION CORP., EBER-METRO, LLC, SLOCUM & SONS OF MAINE, INC., AND CANANDAIGUA NATIONAL BANK & TRUST COMPANY,

Nominal Defendants.

Deposition of FRANK TORCHIO, held pursuant to Article 31 of the Civil Practice Law and Rules, at Underberg and Kessler, 300 Bausch and Lomb Place, Rochester, New York, on the 23rd day of August, 2019, commencing at 9:30 a.m., before Leah Didsbury Reporter, Notary Public.

PLAINTIFF'S
EXHIBIT
182

APPEARANCES:

BROOK & ASSOCIATES, PLLC
BY: BRIAN C. BROOK, ESQ.
100 Church Street, 8th Floor
New York, New York 10007
Appearing for the Plaintiffs

UNDERBERG & KESSLER, LLP
BY: COLIN D. RAMSEY, Esq.
50 Fountain Plaza, Suite 320
Buffalo, New York 14202
cramsey@underbergkessler.com
Appearing for the Defendants

CALIHAN LAW, PC
BY: ROBERT CALIHAN, ESQ.
620 Reynolds Arcade Building
16 East Main Street, Suite 620
Rochester, New York 14614
rcalihan@calihanlaw.com
Appearing for the Gumaer Estate

WOODS, OVIATT, GILMAN
BY: ERIN ELMOUJI, ESQ.
1900 Bausch and Lomb Place,
Rochester, New York 14604
eelmouji@woodsoviatt.com
Appearing for Canandaigua National Bank & Trust Company

Also Present: John Herbert (telephonically)
Patrick Martin

INDEX TO WITNESS

INDEX TO EXHIBITS
(Retained by counsel)

REQUESTS

COURT REPORTER: Do you want him to read and sign?
MR. RAMSEY: Yes, please.
COURT REPORTER: Usual stipulations?
MR. RAMSEY: Other than read and sign, that's fine.
MR. BROOK: Actually, I don't as a matter of -- I've always been trained don't as a matter of what I've always been trained to do, agree to usual stipulations, because it seems everywhere usual stipulations means something different. I agree to the federal rules of civil procedure governing this deposition.
MR. RAMSEY: That's fine.
(Whereupon, the following stipulations were entered into by the respective parties.)

It is hereby stipulated by and between counsel for the respective parties that the oath of the referee is waived, filing and certification of the transcript are waived, and all objections, except as to the form of the question, are reserved until the time of trial.

FRANK TORCHIO,

of Rochester, New York, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. BROOK:

Q. Good morning. This is not your first time being deposed, correct?
A. Correct.
Q. Is there anything about how this deposition works that you would like to go over before we begin?
A. I don't think so.
Q. When is the last time you were deposed?
A. Let's see. I think it was in May of this year.
Q. All right. So if any issues come up, usually the biggest one is just talking over each other. I sometimes am a little slow to get out my question. I am sure the court reporter will let us know, but that's just human nature. So what is your understanding of what this lawsuit is about?
A. Well, my understanding of my involvement in this lawsuit is to valuation, principally of Eber-Connecticut, the operating company that is owned by Eber-Metro, in turn owned by Eber Wine and Liquor.
Q. Or was owned by Eber Wine and Liquor, rather?
A. Sorry. That was correct. Was owned at that time.
Q. And do you understand this lawsuit is largely about whether the transfer of Eber-Metro from Eber Wine and Liquor to Alexbay was a valid transaction?

Page 70

predicated on my valuation of Connecticut.
Q. Right. I am just looking at your report Paragraph 1. I have been asked to provide an opinion regarding the market value of equity of the capital stock of Eber Brothers Wine and Liquor Metro, Inc. as of May 23, 2012.
A. Right.
Q. But in your view, the work you were focused on was just the Eber-Connecticut asset; is that right?
A. If you go further, I think I actually state this.
Q. I don't think there is a dispute here. I am going to you know, I guess, what I am trying to understand a little better, you know, if you're really saying you were focused on Eber-Connecticut, then that would make sense as to why you did not spend much of your report analyzing the liabilities involved here.
A. If you look at Paragraph 4, that puts my analysis in perspective. So it builds up from that valuation. That's the valuation.
Q. Right.
A. There is no operating asset at Metro. There is no operating asset at Wine and Liquor. The only operating asset is their ownership of Eber-Connecticut. So all the valuation work I did revolved around

Page 71

Eber-Connecticut.
Q. Right. And then -- but you also valued Eber-Metro and Eber Wine and Liquor to the extent that you said it was they were insolvent no matter what the value of Eber-Connecticut was, right?
MR. RAMSEY: Form.
A. I wouldn't say it that way.
Q. No matter which valuation of yours you used for Eber-Connecticut, right?
A. My opinion is that the value of Eber-Connecticut was plus any other assets of Metro and Wine and Liquor were less than the liabilities.
Q. And do you understand why it is that I am drawing a distinction between Eber-Metro and Eber Brothers Wine and Liquor for the liabilities?
A. You know, I have a vague understanding that it's some kind of legal machination that's going on here. From my perspective as an economist, what I am looking at is what I think is relevant is what the heck is the value to these ultimate -- the beneficiaries of this trust. And in order to do that, you've got to go up the chain of command. Now, I understand there is some reason why it's important to assess Metro vis-à-vis Wine and Liquor. I don't pretend to understand that. It doesn't make economic sense to me. If it doesn't make economic sense,

Page 72

then it must be some kind of legal stuff that's going on here that allows you to put a wedge between Wine and Liquor -- put a wedge between Wine and Liquor that ultimately puts a wedge between what the beneficiaries of the trust really own.
Q. Right. I think -- let me help you put it in perspective here. So maybe we can have a more productive discussion. So Lester Eber foreclosed on debt that was owned by Eber-Metro and guaranteed by Eber Wine and Liquor. And the company agreed to just give him Eber-Metro. And eliminate the debt to Eber-Metro too, as a result. So there is a legal question certainly as to whether that was done for fair value. Did Lester Eber, given his fiduciary obligations and his various roles, get more value by acquiring Eber-Metro through the amount of his loans? And so that's why drawing this line here is fairly significant. And do you understand at least the general fact patterns as I described it?
MR. RAMSEY: Form. Go ahead.
A. I am trying.
Q. So would you agree that if Eber-Metro did not have all of the liabilities for the pension and Harris Beach that you mentioned on this chart here, then the value of Eber-Metro would have been significantly higher than the 3.8 million dollars in debt that you listed here

Page 73

that was owed to Lester Eber?
MR. RAMSEY: Form. Go ahead.
A. When you say, "did not have", what do you mean by that?
Q. Equal that it was not legally -- at the time of the transaction it was believed that Eber-Metro would not be liable for any of those debts.
A. So --
MR. CALIHAN: Objection.
Q. Let me sort of give you my take on this. And I mentioned to you before in one of your questions my experience. And again, putting myself in the position of willing buyer with knowledge of all the relevant facts. I know from experience that when you try -- when you try to play a shell game with a PBGC about who was the controlling entity and who owns what and where does this liability set, you run an awful risk. I have seen it firsthand. I worked in the case called White Consolidate. That is not unlike this where the company itself tried to say this is not -- the pension is not our liability. It belongs to -- and they sold the company and without the liabilities. And did not have enough money to pay those liabilities. And said, well PBGC, you pick up the rest. And the PBGC said nuts to you. We're going after you. This is fraudulent conveyance. Now,

Page 74

that kind of knowledge is the kind of thing that any individual investor would reflect. So you can tell me well, you know, legally I've got a legal opinion that says this these pension obligations don't -- have nothing to do with Eber-Metro. And I can -- I feel fairly confident that had they sold Eber-Metro and the proceeds were not enough to cover the amount of that pension, either the PBGC is going to say you can't do this transaction or in the case that I have seen, they go after the buyer. And say well, now you bought this. Those liabilities are now on your books and you have more assets than what you just bought because you merged with Connecticut. So now you're on the hook to pay those. And, you know, again, these kinds of quote hidden liabilities are the kind of things that are affected in the ultimate purchase price even if one is -- if a purchase price is offered because they-re going -- a buyer is going to price protect themselves. They're not going to sit there and say, I got this great legal opinion that is not going to be a problem. I can separate the assets from this pension liability.

Q. But what if it actually happened in this case?

A. What if what actually happened?

Q. What if the buyer in this case, Alexbay because it bought it by giving up debt, actually believed that by

Page 75

engaging in this transaction it would acquire Eber-Metro free and clear of pension obligations, would that be relevant to your analysis?

MR. RAMSEY: Form. Go ahead.

A. No. Again, if you go back to that paragraph, I am talking about a willing buyer aware of the facts. You seem to be focused on what is kind of referred to as specific investigators valuation as opposed to a fair market value. Again, we seem to be flipping over into the process as to why something was done and was it done for legitimate reasons. I am out of that. That's not my right here.

Q. You have not made any opinion on whether in this case because Lester Eber was a judiciary, his opinion of the valuation would be relevant to this litigation?

MR. RAMSEY: Form.

A. I don't know what the judge is going to consider relevant or not relevant. I am telling you what is relevant to my valuation is what I have done in this report. You know, whether Lester thought that he could skate on the PBGC, that's Lester's view. I am telling you as a measure of fair market value under the definition that I provided here an investor is going to take into account those obligations for sure.

Page 76

Q. Are you sure that was the case in 2012? There has been a number of elements of the law recently.

A. My involvement going back before 2012 -- I mean look, I didn't -- I don't see anything that would contradict that. The PBGC, as far as I can see, fight like a dog when you try to hide, you know, or skirt and force the PBGC to pay for or to be the trustee for pension obligations. You know, you're in for a fight. I guarantee that.

Q. To what extent in connection with your work in this case did you become familiar with the fight that erupted between PBGC and the Eber entities?

A. Well, you know, I familiarized myself with some of the analysis that the PBGC did. And I think there was a document that I saw that provided some kind of -- I don't know. I guess call it a settlement of some kind. I don't know if that's the right legal term. I read those things.

Q. For this chart, the summary of liabilities, did you consider whether there was other obligors beyond Eber-Metro and Eber Wine and Liquor for any of these debts?

MR. RAMSEY: Form.

A. No. I don't specifically recall that.

Q. Would that affect your analysis of the

Page 77

liabilities if there was a third obligor?

MR. RAMSEY: Form.

A. Possibly.

Q. So are you aware of that after the Alexbay transfer PBGC put a lien on Eber-Metro?

A. Yes.

Q. Are you aware that at the same time PBGC put a lien on Eber-Connecticut?

A. Yes. I think that is consistent with my view of how the PBGC operates. They take fraudulent conveyance very seriously. If they think you're trying to escape, they're going to certainly at least do that.

Q. So is it fair to say then that in addition to Eber-Metro and Eber Wine and Liquor in your opinion Eber-Connecticut was also an obligor for pension liability?

MR. RAMSEY: Form.

A. Certainly from an investor's perspective that's exactly what they are going to expect to happen.

Q. Does it affect your ultimate valuation analysis as to whether you put that liability in the Eber-Connecticut analysis or further up the chain?

A. So if the liabilities are at the Eber-Connecticut level, that would reduce valuation for Eber-Connecticut by the pension.

Q. Okay. But you did not do an analysis with running the numbers in that way; is that right?
A. No.
Q. Do you think that you perhaps should have?
MR. RAMSEY: Form.
A. Well, I don't think -- it doesn't matter. So I didn't -- it's kind of like a -- what is the point? The solvency opinion has to do with Eber-Metro and Eber Wine and Liquor. For I mean -- this gets back to what I said before about the economics of it. I am still a little fuzzy about why the hell it matters between Eber Wine and Liquor and Eber-Metro. But notwithstanding, to me it didn't really matter whether I put the liabilities of Connecticut as long as they are there with Eber-Metro when I am doing a solvency analysis of Eber-Metro that's what counts. So it's like what's the point.
Q. So would you include the liabilities at each level for the balance sheet of all three companies?
A. If the total liability is at Eber-Connecticut, then I've accounted for the liability relative to Eber-Metro. I netted it out against the Eber-Connecticut assets.
Q. How do you decide where that goes?
A. As I said, it's difference. Not a distinction. It doesn't matter to me. It's an economic matter. You

know, what is the point to make more paper? To say well if it's Eber-Connecticut then Eber-Connecticut value is lower, but then it's the same flip side that Eber-Metro has less operating assets. I am not sure I understand. I know it must make such kind of legal difference, but from my perspective, I just don't see what the point would be to do that analysis.
Q. We were talking about PBGC. What about the Teamsters liability? What is your basis for believing that is something -- that a reasonable investor would attribute to Eber-Metro?
A. Same basis. I think -- I know that there was a lawsuit over payment of the Harris Beach amount. And they sued for fraudulent conveyance.
Q. Do you know the timing of those lawsuits?
A. That would have been a post-valuation date.
Q. Right.
A. But my point is that from an investor's perspective, it's like day follows night. You start playing around with pension obligations whether it's the PBGC insured and pension from Teamsters, you are going to price protect yourself. And I think the same holds true with the other obligations as well.
Q. If a liability is contingent upon a creditor successfully pursuing a fraudulent conveyance lawsuit, is

it really in your opinion appropriate to include that as probable contingent liability?
A. That's not what I said.
Q. For Harris --
A. I said that day follows night. If you tried to separate the liabilities from the operating assets, you're going to get fraudulent conveyance. An investor is going to certainly reflect that. They will not say, "I will roll the dice on this." No. These are serious obligations. Particularly the PBGC and I would also include the Teamsters in that. And the only point I raise about the Harris Beach is that look, that's exactly what an investor is going to anticipate. You try to hide liabilities from the assets, and this is what you're going to get. An investor knows that. You just can't ignore that. You can't put blinders on and say this doesn't matter. Yes, it matters. It matters a lot. Particularly with a company for which the assets are less than the liabilities, it matters a whole hell of a lot.
MR. RAMSEY: Take another five, Brian.
(Whereupon, Exhibit Number 130 was marked for identification at this time.)
Q. Let's do one more document for now. So for the record, I am showing you what's been previously marked as Exhibit 73 and newly marked Exhibit 130. Have you seen

either of these documents before today?
A. Let me read it. I think I have seen Exhibit 74 before. It looks familiar. I am not sure I recollect 130.
Q. So looking at Exhibit 74 then, you see it is a confession of judgment signed by Wendy Eber on behalf of the Eber Brothers Wine and Liquor Corp. And that's as to the Teamsters liability?
A. Right.
Q. And that number matches within five cents the number you've got in your summary of liabilities, right?
A. Yes.
Q. Do you see that this confession of judgment only as to Eber Brothers Wine and Liquor Corp and not Eber-Metro?
A. So I think you're referring to the heading in there that says the defendant is Eber Wine and Liquor corporation.
Q. Yes.
A. Yes. It says Eber Wine and Liquor Corporation. It does not say Eber-Metro.
Q. Then looking at 130. That's the exhibit in front of you. Wendy Eber is explaining the reason for that. She says in the last paragraph, "I had modified the confession of judgment to reflect that it is against

Eber Brothers Wine and Liquor Corporation and not the Eber companies." Do you see that?
A. I see that.
Q. So is it your opinion that these documents reflecting that the liability was only against Eber Brothers Wine and Liquor Corp does not change your assessment that that liability belonged to Eber-Metro?
MR. RAMSEY: Form, legal opinion.
MR. CALIHAN: Objection to form.
A. Yeah. You keep saying belonged to. I am saying that an investor is going to take that into account. They are not going to put little compartments and say this is not the obligation of Metro. You know, what this says, it says. It doesn't alter my opinion as to how an investor is going to look at these kind of obligations.
Q. And by these kind of obligations, do you mean pension obligations specifically, or any debt belonging to the parent company that is transferring its subsidiary?
A. Most certainly it's going to reflect the pension, both the PBGC as well as the Teamsters, but yes. Clearly for a company that -- I say the company -- for the situation where the assets of Metro are such that obligations, even if you consider them up the line, can't

be covered, yes. It will. They just -- it just can't be ignored.
Q. Because of the likelihood of fraudulent conveyance?
A. That is a distinct possibility. Like I said, I think that any time you have a situation where you're selling assets and you're receiving a price that is less than the liabilities, that is exactly what you're going to encounter and an investor is going to know that.
Q. So focusing on Harris Beach, that's not a pension obligation. Does it change your conclusions in any way that at the time of the Alexbay transfer in 2012 the only party being sued by Harris Beach and that owed money to Harris Beach according to its engagement agreement was Eber Brothers Wine and Liquor?
MR. RAMSEY: Form. I will make the same objection. I think you're looking for a legal conclusion here.
A. Yeah. I mean -- look, I know that they did sue all the entities at some point for payment.
Q. I do want to be clear. I am not looking for a legal conclusion because your valuation is not based upon what the actual law was, right? What the actual liabilities were as determined by later courts, correct?
A. Fair enough.

Q. Just as if you're doing a valuation based upon what people knew at the time, they wouldn't be based upon what restated numbers were a year later, correct?
A. Fair enough.
Q. So in this instance, why isn't the determination of what the liabilities of Eber-Metro were something that should be based on what the understanding was at the time of management and the purchaser of what the liabilities of what Eber-Metro would be?
MR. RAMSEY: Form.
A. Because I am trying to understand how an investor, a willing buyer, is going to view this company. That is my analysis. I mean, I don't know how else to say that. I've said it five times now. And you keep trying to say, "Well, don't you want to value it the way that Wendy valued it?" No. That's not my task here. I mean, she did what she did. She wrote what she wrote. Her view is what it is. I am telling you how I am doing the valuation.
Q. And I am just -- I am not trying to be obtuse here. I'm trying to get a clear record. So the reasonable investor in your view would conclude that Eber-Metro would still be on the hook because upon transfer, Eber Wine and Liquor was left with insufficient assets to meet its debt; is that fair to say?

A. You're talking about all the items?
Q. Yes.
A. So number one, there is the legal determination that I said before.
Q. Right.
A. That I have been given. Number two, it makes absolutely sense to me from an economic perspective. That any investor is going to price protect themselves, particularly for a company that's in financial distress. And that I think there is no dispute. Certainly without question even Eber-Metro is in financial distress. And when you are a company in financial distress and you've got liabilities attached to those assets, boy, oh boy, you know, you just can't ignore that. And that's my opinion. That investor would not ignore that. And would not put it in compartments notwithstanding what Wendy thinks. It's interesting, but it doesn't affect my opinion.
Q. Okay. Let's take that break.
(Whereupon, there is a short recess in the proceedings.)
Q. Okay. So going to your report in general, you did five valuation analyses for Eber-Connecticut; is that correct?
A. Yes.

Page 86

Q. But you did not offer an opinion on which of those valuation is most reliable or some combination of them to arrive at a final number, did you?
A. No. I provided a range of values from each of those five. The range of values results from each of those five measurements.
Q. Why didn't you offer an opinion on what the correct value should have been?
A. Well, in my view, the range that I developed and applied told me that this was an insolvent company.
Q. Not Eber-Connecticut though?
A. No. Up the chain, yes.
Q. Right. But as we have been suggesting, there are potential questions as to whether or not the numbers for the debt are correct or legally relevant or something like that.
MR. RAMSEY: Form.
Q. So in that instance, wouldn't it be important about to what the value of Eber-Connecticut is if the value would determine whether or not it was solvent -- the parent companies were solvent?
A. You mean a point estimate?
Q. Yes.
A. Well, if you want a point estimate. Just take the midpoint, that's fine.

Page 87

Q. Why is that appropriate?
A. There are five measures of value. Each of them has problems. But these are the kinds of things -- not with understanding problems -- these are the kind of thing that investors are going to look at in formulating their opinion. If you're so inclined to only want to point an estimate, I mean, you know, in my view a reasonable range is more informative. I think it provides more information.
Q. Do you think --
MR. RAMSEY: Go ahead, finish your answer.
A. I think a reasonable range provides more information. It is un essence the sensitivity analysis or effective sensitivity analysis of what you were referring to earlier about well, is there uncertainly with numbers. Well, the more numbers you have, the more certain you are about what ultimately that range of value is.
Q. Do you consider all five methods to be equally reliable?
A. You know, so first I would say that these measurements are things that an investor would look at. Each of these methods has problems perhaps multiple problems. I think if you start with the offers or the transactions. So start with the Eder-Goodman

Page 88

transaction. That has a significant problem because of the substantial rights. I've got two pages in my report talking about the substantial rights. Now, I try to do a conservative estimate as to what those rights are to come up with some value. But, look, for a company in financial distress in particular, the preferred stock aspect of it is going to be huge -- absolutely huge. So is that a problem? Yeah. I mean you try to adjust away from it. That is a problem. You know, that is one of those things that make that valuation uncertain. Southern offer to a lesser extent -- the Southern offer also has this right of first refusal that causes one to do again an adjusted valuation of the Southern offer.
Q. And the Southern offer wasn't actually accepted?
A. Look, you know, the Southern offer wasn't accepted, but I view that as a bona fide offer. And a bona fide offer is a reasonable thing to use in the analysis. So I wouldn't -- I am not going to discount it because it wasn't an actual transaction. I think it's still relevant.
Q. Can you please explain what you mean by bona fide offer?
A. Well, there were something -- I think it was like 14 amendments. It was far along. There was a lot

Page 89

of paperwork involved -- due diligence.
Q. I mean in general what a bona fide offer is? Like how does something constitute that?
MR. RAMSEY: Form.
A. I draw a distinction between, you know, saying I have, you know, a preliminary offer of interest. That I wouldn't consider a bona fide offer. But if you've got a substantial amount of paperwork behind an offer with a lot of conditions and things that have been formulated, that to me is a bona fide offer. That's what I view anyway.
Q. Is a --
A. You want me to finish my answer? I was not done. So we can go back to any one you want to. So with regard to the Pole-Bridge Bowman offer, that to me has problems too. It's a transaction that I am not 100 percent comfortable with that being the measure of value. I don't know that I would -- I think that has problems as well.
Q. Why aren't you comfortable with it?
A. Well, I am concerned that it could possibly not be an arm-lengths transaction. I can't make a determination one way or the other, but it causes me concern.
Q. Why -- just to follow up on that, what about it

Page 90

does not appear to be arm's-length?
MR. RAMSEY: Form.
A. I was concerned that the company was repurchased at the same price. It could be -- there could be explanations why that occurred, but the fact of that doesn't sound right to me.
Q. I am sorry. What do you mean by that?
A. It was unwound.
Q. Okay. The terms of the exercising how Wendy Eber ended up acquiring it?
A. Yes. I didn't see anything contemporaneous to the transaction itself that could indicate this. The ultimate unwinding caused me a little bit of questioning whether the transaction was a pristine transaction. And also problem -- the other problem I had with that is that there was a right of first refusal in that offer. So you have to adjust that. Now with regard to the farmers --
Q. I just want to stay on that one for a second, then we will jump to the other just so the transcript is -- in forming your opinion, were you aware of who were the owners of Pole-Bridge Bowman and Partners?
A. I know that it was a gentleman named Steurm was the principal.
Q. And what is your understanding of what his relationship was to the Ebers?

Page 91

A. He was the consultant. My understanding he was a consultant. Maybe the term is workout consultant for companies in financial distress to get to them to work out of their distress. And I think he was a lawyer.
Q. And are you aware that the Ebers have said that he was their lawyer?
MR. RAMSEY: Form.
A. I know he was their consultant. I don't know that he gave legal opinions.
Q. Would it affect your assessment of whether this was an arm-length transaction if you found out that Glenn Steurm had an attorney/client relationship with the Ebers individually or with one of their companies?
A. No, I don't think so. I am not sure why that would affect my view of things whether he is providing consulting services or legal services. I am not sure that matters.
Q. Is a fiduciary relationship an arm-length relationship in your opinion?
MR. RAMSEY: Form.
A. Is a fiduciary relationship an arm's-length relationship? I am not sure what you mean by that.
Q. Do you understand the term fiduciary relationship?
A. The transaction -- because he is a fiduciary

Page 92

that the transaction would not be arm's-length.
Q. I am asking if the fact that there is a fiduciary relationship between two individuals prevents that transaction for being characterized as an arm's-length transaction?
MR. RAMSEY: Form.
A. I would think it would be just the opposite. I think the fiduciary would have an obligation to make sure that whatever transaction took place was a fair market value unless I am missing something. You seem to have a different --
MR. RAMSEY: I think we're in the legal realm here.
Q. So the term arm-length, is that fair to say that is a term that is important to your valuation work?
A. Well, it is a shortcut to Page 1 of my report that talks about a willing buying and willing seller with knowledge of all relevant facts and no compulsion to buy or compulsion to sell. And so those are the things that in my view constitute an arm's-length transaction.
Q. So let me pose to you the hypothetical. If the transaction was entered into between a lawyer and his client to acquire an equity interest in a company and the lawyer did not actually want to buy that interest, but it was done for structural your purposes to benefit the

Page 93

client, would you consider that to be an arm's-length transaction?
MR. RAMSEY: Form.
A. Structural purposes to -- that's way beyond -- I mean I don't know how to answer that question. Structural purposes to benefit --
Q. One simple thing. I will rephrase. If a person -- you refer to as a will buyer?
A. Yes.
Q. What did the buyer actually did not have any economic interest in acquiring the equity and he did it solely to fulfill his legal obligation to a client.
MR. RAMSEY: Form.
Q. Could you rely on that transaction to determine the value of the equity?
A. You're saying a fiduciary would have a legal obligation.
Q. I am not saying necessarily as a fiduciary. I am talking about a particular circumstance where a lawyer decides -- a lawyer specifically says, "I do not want to buy this, but I will do so if I have to. So that the sale can go through."
MR. RAMSEY: Form.
Q. Is that just impossible to believe?
A. It's a little hard to believe.

Page 94

Q. I will show you a document.
A. Okay.
Q. All right. I will read for you a memo from Glenn Steurm, the owner of Pole-Bridge Bowman.
A. Uh-huh.
Q. To Pat Dalton, a lawyer for Wendy and Lester Eber and copying Wendy and Lester Eber dated May 26, 2010. That is I think two days before -- two to four days before the effective date of the Pole-Bridge Bowman transaction?
A. Okay.
Q. This memo states, "The current proposal is for a single-member LLC New-co to acquire the interest and that I be the only equity holder of the new LLC. Here are the terms that we discussed. One, New-co purchases a six percent equity interest in Connecticut for a secured non-recourse note in the amount of blank dollars. Wendy Eber has an exclusive right of first refusal to purchase the entire equity interest from New-co. If Ms. Eber does not exercise her right, then Metro has the next right of first refusal to purchase the entire equity interest. If Metro does not exercise its right, then Eder-Goodman has the final right of first refusal to purchase the stock. If neither Ms. Eber, Metro or Eder-Goodman elects their right, then New-co will be

Page 95

required to retain its interest. The Ms. Eber will have a proxy to vote the equity interest held by New-co and a limited Power of Attorney. I have no pride of authorship in this outline. If we can find a different structure that works that would be better for me. Based on that memo, does that sound like a transaction that was negotiated at arm's-length?
MR. RAMSEY: Form.
A. I am trying to understand. How these items that you listed to me indicated that it's not arm-length.
Q. Those items actually aren't. I was mostly doing that because you don't have the document in front of you and I want to be fully transparent and read everything. I think the point I want to focus on is that you said -- I actually left out the first line. That's really important. Pat, as we discussed this morning, we need to identify an alternative purchaser of the six percent interest the Connecticut, LLC. The current proposal is for a single-member LLC. New-co to acquire the interest and that I be the only equity holder of the LLC. And then at the end he says if we can find a different structure that works that would be better for me.
A. So read that first sentence again?
Q. As we discussed this morning, we need to

Page 96

identify at an alternative purchaser of the six percent interest in the Connecticut, LLC.
MR. RAMSEY: And what is the question.
Q. So the question is, based on the fact that Glenn Steurm is saying Wendy and Lester Eber and their lawyer -- that he does not want to actually buy the six percent, does that sound like an arm's-length transaction to you?
MR. RAMSEY: Form. I am not sure that's an accurate interpretation.
A. I am -- you're asking me to interpret this letter to mean that he does not want to buy this?
Q. I am asking you if someone were to conclude -- so this is a hypothetical now. If someone were to conclude that Glenn Steurm did not actually have an economic interest in purchasing the six percent equity that was sold to Pole-Bridge Bowman and Partners, would that affect your opinion of whether that was an arm's-length transaction?
A. It could. If there is no economic interest --
MR. RAMSEY: You've answered it. It could.
A. It could.
Q. Have you ever heard of a round-trip transaction?
A. Well, I know a round-trip transaction with

Page 97

regard to a security. You buy and then you sell it.
Q. Are you familiar with a round-trip transaction in which it creates an appearance of economic substance, but in fact because money is going both ways there is no real economic substance to it?
A. Yes. I've actually offered opinions on this for the Department of Justice.
Q. And in the case of the Pole-Bridge Bowman transaction, it was funded by the note for the same purchase price. Do you see any similarities between that and a round-trip transaction?
MR. RAMSEY: Form.
A. I mean note in lieu of cash. I mean it's a still an asset on the balance sheet for the company. So I am not sure what you mean. That only cash counts?
Q. No. I am just saying if someone supposedly purchases equity in a company, but they receive the money to do that from the company itself such as a company receives no cash.
MR. RAMSEY: Form.
Q. Does that affect?
A. If the asset has value whether it's cash or not, it shouldn't matter.
Q. Well, okay.
A. If the buyer is providing a note saying, "I owe

Page 98

you this money." There is a note. That's my obligation to you in lieu of giving cash. You seem to be drawing a distinction between the value of a note and the value of cash. Is that what you're saying?
Q. I am not necessarily drawing a distinction there. What I am saying is, you know, let's step back for a minute. For what reasons does a company -- a privately held company generally sell equity in a company that it holds?
A. You mean like a secondary offering?
Q. A secondary offering or where like in this case where Eber-Metro sold some of the interest it held in Eber-Connecticut?
A. Well, for a secondary offering they generally are trying to sell new shares to investors too, you know, for a variety of reasons. But, for example, make a capital investment of some kind. Selling shares, selling existing shares held by some other entity. You know, selling existing shares doesn't raise any new capital per se. Other than that, I don't know how to answer your question as a general matter.
Q. Did you review the critique of this transactions economic substance from Glenn Liebman?
A. Yes. My recollection is that he also had issues with regard to whether this was arm's-length.

Page 99

Q. Right. And one of the things he pointed out was the interest rate on the note was only two percent when the company was at the time borrowing money from Lester Eber at 12.5 percent. Does that make sense to you?
MR. RAMSEY: Form.
A. You know, I have a hard time with that. When the company borrows money, it's paying. And it's the company credit that dictates the interest rate. So if a company is in financial distress and it wants to borrow money, it's likely that it's going to pay a high interest rate. Now, in this case, this is an asset that is being provided to the company. A company is not borrowing this. Unless I am missing something.
Q. Isn't the company loaning money?
A. Huh?
Q. The company is loaning money, is it not?
A. How? If it's an asset on the company's books -- it's giving shares to the LLC and the LLC is getting a note.
Q. Right. So it's giving up shares that were in a company a going concern, right? So that comes off the balance sheet?
A. Yes.
Q. And on the balance, it gets this nonrecourse

Page 100

note?
A. Right.
Q. At the end of the day the only thing it can really get for that is just the shares back that is initially transferred if it were to foreclose on, right?
A. Where does it say that?
Q. It's a nonrecourse note, right?
A. They couldn't pay it.
Q. Would it matter whether Pole-Bridge Bowman had any other assets to you?
A. No. I am just questioning your -- you draw a conclusion that the only way -- you said that the only way is to get the shares back. And I never saw that written anywhere.
Q. I realize that. And that's where I was jumping ahead. I may have left out some facts from here. Do you know anything about Pole-Bridge Bowman and what kind of investments or businesses it was involved in?
A. I know it was an LLC. I know that Steurm was the principal of that LLC. Beyond that, I don't.
Q. Would it affect your assessment of whether this was an arm's-length deal to find out that Pole-Bridge Bowman was an entity that was created with no other assets solely for purposes of engaging in this transaction?

Page 101

MR. RAMSEY: Form.
A. No. I don't think so.
Q. So if an entity has no other assets and it's a nonrecourse note, if the note isn't repaid, then isn't it true that the company's only recourse is to require the shares that it initially distributed?
A. Well, I mean, imagine that if one state of the world is where the value of the shares go up -- would the LLC just say, "Oh. Okay. Here is your shares back." Why wouldn't they just pay off the note and keep the shares? That makes economic sense to me. And you're dismissing that as a possibility.
Q. Well, isn't that what actually happened? The value of the company definitely went up once it become profitable, right?
A. It became profitable, but I can't say I am hypothesizing -- look, you said the only possible outcome is if they give the shares back. And I'm saying that doesn't make sense to me. I can imagine -- I am not saying it happened. But I can imagine the state of the world where it is in the economic interest to Steurm to say, "Hey, the values of these shares is increased 10 times what it was in 2010. Hell. Here is the money for the note. We will close this off. I will take the shares." Why not?

Q. Would it affect your assessment with whether the Pole-Bridge Bowman transaction was arm's-length if you were to learn that it was engaged in part to compensate Glenn Steurm for his services?

A. Well, I don't think that would be a sufficient, you know, indication to eliminate that as an indication of value.

Q. Would it require an adjustment at least?

MR. RAMSEY: Form.

A. Look, you know, you want to have an assessment as to whether it was a deal at fair market value. That's ultimately what you're talking about. Do stock transactions occur for parties that are consultants to particularly small firms? Yes. Does it mean that they are necessarily not an arm's-length transaction? Well, no. In fact, I can imagine, you know, that you would want to strike a deal at fair market value. So I don't know that I can agree that it's a de facto collusion that someone is being -- instead of providing cash, they are given stock in a company. I don't know that is necessarily a non-arm's-length transaction or to put differently that transaction took place at something other than fair market value based solely on that.

Q. Isn't it a reason to question the fair market value more though?

A. Well, it's certainly one of those indications that you are concerned about it. And that's what I said a minute ago, I am concerned. I think it is a transaction that an investor is going to look at. But with full knowledge at least of the information that I had, yes. I would say that there are problems with it. Just like there is problems with all these transactions. I mean everything has an issue. There is no question about that. So that's the best way I can answer your question. It's a concern. It's a problem, but all these metrics have problems. And that's why the range is important to get a sense as to whether there is some kind of assessment of valuation range each year that allows you to draw a conclusion.

Q. Just so I am clear, and correct me if I am wrong. In your opinion, the fact that the Pole-Bridge Bowman transaction was in part compensation to Glenn Steurm would not necessarily affect any of your calculations in terms of what the valuation would be based on the Pole-Bridge transaction?

A. No. Not in and of itself it would not.

Q. But just on the broader point, if a fact-finder were to conclude that a transaction was not conducted at arm's-length, would that mean in your view the transaction should be excluded from a valuation analysis?

MR. RAMSEY: Form.

A. Well, I think the question is whether the trier of fact would conclude that it's outside of it. Not so much a valuation expert. If a trier of fact concludes that it's not arm's-length transaction, could well be I am not going to consider this transaction. From my perspective, I guess I kind of take in a little different view of this. Like I said, the ultimate determination is whether it's a fair market value. And one of the things that is kind of interesting is whether or not the valuation is within the range of other evaluations. That's kind of interesting to me. That may not convince a trier of fact. The trier of fact says, "No. It's not arm's-length. I am not going to think about that." Okay. So be it. Cross it off your list. But for me -- and I think for an investor it is a data point of interest.

Q. For an investor, do you believe that would be appropriate to rely solely on the Pole-Bridge Bowman transaction as a basis for value?

A. If it was determined to be non-arm's-length?

Q. Either way. Just based on the facts that you know about the transaction where you question it, do you believe that it would be appropriate for an investor to base valuations solely on that transaction and not

consider any other valuation method?

MR. RAMSEY: Form. Go ahead.

A. The way I can answer that question is I don't know that I would look at any of these five alone and say that's the only thing you should look at or if that was the only thing available. Is it a precise, accurate measure of value? The only one that I really like that I think has the least amount of problems is the Prospect Beverage. That one -- I mean the problem with that is that it's 10 years old at that time of transaction. But, you know, look at the other dates. I mean the Eder-Goodman is four years old -- five years old.

Q. You're missing -- -

A. Six years old. Like I said before, so each of these has problems. You've got all of these right issues in many of these transactions. The Prospect, is in my view, one of the tightest comparable transactions that I have encountered in doing valuations.

Q. Is it a coincidence that is the transaction that results in by far the lowest value for Eber-Connecticut?

MR. RAMSEY: Form.

A. It is a coincidence. It turns out that way. But maybe that is not a coincidence. Maybe that really reflects what the value of what Eber-Connecticut was.

Page 142

Q. You just did it wrong there. It went slightly less negative in 2010. Slightly less negative in 2011. Slightly less negative in 2012. That's the trend as far as earning goes. It doesn't jump back up, does it?
MR. RAMSEY: Form. Are you testifying, Brian, or are you asking him the question?
A. I am looking at the bouncing around. It's bouncing.
Q. Do you see that revenue?
A. I see it. Do you see it? You're trying to assess a trend here. I don't see a trend.
Q. Do you see revenue is essentially flat from 2010, 2011 and 2012 right around 36.5 million dollars?
A. Here is what I see. I see that the beginning of this series looks like the end of the series. That's what I see.
Q. So you would predict based on this that in 2013 there would be another huge loss like after 2008? Is that what you're saying?
MR. RAMSEY: Form.
A. No. I said what I said. I am looking at what the profitability looks like in 2007 and 2008. That looks awfully similar to what happened in 2011 and 2012. So where is the trend?
Q. Do you think that the Yellow Tail was going to

Page 143

dual them again?
A. Yellow Tail went out in 2009. That's what you just told me.
Q. So past event couldn't reoccur, right?
MR. RAMSEY: Form.
A. Whether it could occur with another wine, I don't know.
Q. Do you know whether Yellow Tail --
A. I am looking at these numbers and I don't see the trend that you see.
Q. Okay. That's fine. And as part of your analysis you did not attempt to determine whether Lester and Wendy Eber were making changes in the business to improve profitability; is that right?
MR. RAMSEY: Form.
A. My analysis reflects and all these analysis reflects that there will be improvement in profits because it's positive equity value for Eber-Connecticut. So in all those scenarios, there is improvement in profit.
Q. As part of your analysis you've reviewed the May 23, 2012 order of the court in which it declared that Alexbay's acceptance of Eber-Metro's stock in satisfaction of the debt was commercially reasonable, correct?

Page 144

A. Yes.
Q. Did you rely on that in any way?
A. No.
Q. Did you make any attempt to asses whether that the information to provided to that court was accurate?
A. No. I mean only to the extent that I am doing a valuation with regard to Pole-Bridge Bowman, which the court relied on.
Q. And do you know if the court actually relied on anything?
A. I thought so. I may be mistaken, but thought the transaction was the key factor that the court used.
Q. It was disclosed to the court. But did you see anything indicating that the court actually looked at the papers given that it was uncontested?
MR. RAMSEY: Form.
A. Maybe if you show me the document, I can refresh my recollection. Sitting here today, I don't remember.
Q. Do you remember that action was not contested?
A. I don't remember.
Q. In terms of what was submitted to that court, did you consider the description that Lester Eber gave to the court of what Eber-Metro was worth in your analysis?
MR. RAMSEY: Form.

Page 145

A. My valuation analysis is indicated in this report. I don't remember what Lester said when reflecting my valuation. So I would have to look at what he said. Maybe what he said is in there. I just don't know.
Q. Okay. This is previously marked Exhibit 45. It's an affidavit from Lester Eber dated March 14, 2012. I am going to direct your attention specifically to Paragraph 6. Okay.
A. If you don't mind, I am going to read the context of this.
Q. Sure. Okay.
A. Okay.
Q. Have you seen this before today?
A. I don't remember seeing this.
Q. And is there any new information in there for you?
A. I don't know if this is new. It is valuing Eber-Connecticut at 4.6 million.
Q. And that's based on the Pole-Bridge Bowman transaction you understand, correct?
A. It doesn't say that.
Q. I guess it says very recent arm's-length sales on the open market. Do you think that's referring to Pole-Bridge Bowman?

MR. RAMSEY: Form.
A. I don't know.
Q. Is it your understanding that the Pole-Bridge Bowman transaction was conducted on the open market?
A. I think by open market it means at fair market value. I don't know. I am not sure what open market means in this context. But does it say that Pole-Bridge Bowman is n here somewhere?
Q. I am not sure it's in this document. I will represent to you another document filed by the lawyers reference only the Pole-Bridge Bowman transaction and did not reference any other transactions involving the company.
A. Okay.
Q. So I want to draw your attention in particular to the last line there. It says, "Because it, Eber-Connecticut, is Metro's only significant asset that 79 percent interest valued 3.66 million itself establishes the value of Metro." So he didn't mention anything about any liabilities there, correct?
A. No.
Q. Do you know why that is?
MR. RAMSEY: Form.
A. No.
Q. Do you consider this statement by the purchaser

of Eber-Metro about his understanding of its value to be relevant to your analysis?
A. Well, it seems to be contradicted on its face anyways. It seems to contradict what I have been provided as a legal assumption. I don't know. I mean, you know, whether -- so this seems to be consistent with your legal definition as opposed to the legal definition that I was provided with. But it also seems to contradict what I said earlier, that an investor would certainly reflect those liabilities and any assessment of Eber-Metro. Best I can do with that.
Q. And I think you may have answered this before, but I wanted to make sure I understand. In your opinion, the purpose that Lester Eber and Eber Wine and Liquor had for entering into this transaction doesn't affect your valuation analysis; is that right?
A. The purpose?
Q. Such if the purpose was to shield assets from creditors, would that affect your analysis?
A. I mean it doesn't affect my solvency opinion. It doesn't affect my valuation the Eber-Connecticut. Those stand independent. Whether the trier of fact somehow because of what you say is true that they think this transaction should be undone accordingly -- that's really a finding that the court may or may not. But it

doesn't -- no. It doesn't really affect my opinion.
Q. Okay.
A. Unless I am missing something.
Q. If the transaction is engaged in for the purposes of shielding assets, doesn't that affect the probability that contingent liabilities would be assessed against it?
MR. RAMSEY: Form.
A. I think if that was the -- for example, if an investor -- let's hypothetically say Lester did that, it may affect his view -- specific investment view. But it doesn't affect, you know, what I think that a reasonable investor would assess in this particular instance.
Q. So in your opinion, you think a reasonable investor would look at this transaction and think that it would not be a successful way of shielding Eber-Metro and its interest in Eber-Connecticut from the creditors of Eber Brothers Wine and Liquor Corp; is that right?
A. I think that's fair.
Q. Now, you have done a lot of corporate transactions and valuating them. Have you ever seen a transaction with the same general setup as this, where an officer or director of a company transfers it to himself on the grounds that he is a creditor foreclosing on a loan that he had given to the company?

A. It's pretty specific facts.
Q. We can open it to officer or director.
A. Okay. I mean the best I can think of -- I have been involved in cases where the company has been taken private by officers or directors. And as I said, there has been cases in which in a transaction the common shareholders got nothing because of priority claims. But nothing is coming to my mind about a single case that contains all those facts.
Q. Right. I think is it fair to say the distinguishing feature is how this company was acquired through a creditor foreclosure attempt as opposed to a more transparent sale or purchase?
MR. RAMSEY: Form.
A. So you're asking me if I have been involved in a case --
Q. Let me step back. In those cases where management acquired the company, took it private and whatnot, is it fair to say there were a number of procedural protections that were involved to ensure that shareholders were not getting shafted?
MR. RAMSEY: Form.
MR. CALIHAN: Form.
Q. Ensure that shareholders were not being taken advantage of?